NO. 20157

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

AMCO ELECTRIC,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITIONER'S OPENING BRIEF

PETITION TO REVIEW AND SET ASIDE ORDER OF NATIONAL LABOR RELATIONS BOARD

MILLIKAN, MONTGOMERY, FRANCISCUS and OLAFSON

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TABLE OF AUTHORITIES CITED

Statutes

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PETITIONER'S OPENING BRIEF

On May 24, 1965, the National Labor Relations Board entered a decision and Order in its Case Number 21-CA-6024 against the above named Petitioner arising out of an alleged unfair labor practice in violation of 29 U.S.C., Section 158(a)(1) and Section 158(a)(3), which allegations were contained in a Complaint filed against Petitioner.

The Petitioner, as an aggrieved person, invokes the jurisdiction of this Court to deny enforcement of the Board's Order or vacate or set aside or remand or modify that Order under the authority of Section 10(f) of that Act, 29 U.S.C., Section 160(f).

The acts out of which this case arose occurred at Vandenberg Air Force Base, California, where Petitioner was engaged as

an electrical subcontractor and was engaged, as found by both the trial examiner and Board, in interstate commerce subject to the Act.

QUESTION PRESENTED

The sole question presented by this petition is, was the Petitioner's discharge of Donald Crowe an unfair labor practice?

STATEMENT OF FACTS

Amco Electric, Petitioner, is a California corporation with its main offices located in Altadena, California. During the time in question Petitioner was engaged in performing electrical work in connection with the missile installation at Vandenberg Air Force Base as a subcontractor.

Donald Crowe, the alleged discriminatee, commenced work for Petitioner as an electrician on April 27, 1964. About one month later he and four others quit work to protest the reclassification of a fellow employee. Through the intercession of David G. Milne, business agent for the local IBEW, the five men were permitted to return to work the next day (Rep. Tr. p. 6, line 4 to p. 7, line 14).

On June 19, Crow, who was working at "C" site (at Vandenberg), came up from the underground capsule to get some materials and observed two iron workers "doing electrician's work" (Rep. Tr. p. 9). Crowe asked the workers to cease until he could call his

steward to talk to them. Crowe then went over and used a radio on a truck parked nearby. What he did next is a subject of flat contradiction in the testimony. Crowe testified that he first attempted to contact Savage, his union steward, and only after he could not locate Savage did he attempt to call Frank Lowater, a foreman (Rep.Tr. p. 10). The testimony of Norman H. Coghlin, vice president and field superintendent of Petitioner, directly contradicts this. Mr. Coghlin testified (Rep. Tr. p. 72) that he had the radio on during all times mentioned and the only call from Crowe he heard, was Crowe calling Lowater. He never heard any call from Crowe to Savage. Mr. Lowater, a witness for the general counsel, also had his radio on and he testified that the first he heard from Crowe was Crowe calling him (Rep. Tr. p. 91). No other witness testified to having a radio on. This conflict in testimony was resolved by the trial examiner against Crow's version.

In any event, Crowe called Lowater and talked to him about something. Again we have a flat contradiction in testimony. Crowe testified (Rep. Tr. p. 13) that he asked Lowater if he knew where Savage was and asked him to relay a message to Savage that the Iron Workers were moving fans, electrician's work, and that Savage should come over to "C" site. Coghlin testified (Rep. Tr. p. 73) that the substance of this conversation was that Lowater should immediately leave where he was and come over to "C" site as "the iron workers were doing our work". Lowater was the foreman of the crew that would move fans if they were moved by electricians. Lowater's testimony on this conversation was that Crowe

told him to get Savage over to "C" site (Rep. Tr. p. 91). He then stated that he replied, "10-4, I will be right over" (Rep. Tr. p. 93). On cross examination, Mr. Lowater was asked that if it was possible, in light of his definitely recalled response to Crowe, that Crowe had told him, Lowater, to come over to "C" site. Lowater admitted that this was possible. He then testified that Crowe told him to get Savage to "C" site and also for Lowater to go to "C" site. Thus, we have another direct conflict in testimony, one that cannot be resolved by making different inferences, but could be resolved only upon the witnesses' demeanor and the trial examiner's evaluation of their credibility. This direct conflict was resolved in favor of the conversation supported by both Coghlin and Lowater that Crowe had told Lowater to come over to "C" site.

Because of the above order to Lowater, Crowe was fired. He filed a grievance with his union. His discharge was brought up for discussion by the Union at a joint conference committee of employers and employees, but no action on it was taken by the committee (Rep. Tr. p. 53).

Crowe then filed charges against Petitioner with the NLRB (Clk. Tr. p. 3). A complaint and notice of hearing was issued by general counsel (Clk. Tr. p. 4) and Petitioner filed its answer (Clk. Tr. p. 7). The hearing was held on October 13, 1964 (Rep. Tr. pp. 1-100) and on January 19, 1965 the trial examiner issued his decision (Clk. Tr. p. 9). General counsel filed exceptions (Clk. Tr. p. 17) and on May 24, 1965, the Board issued its decision (Clk. Tr. p. 22). Petitioner filed its petition to set aside the order of the

National Labor Relations Board (Clk. Tr. p. 32) and the Board filed its answer and cross-petition (Clk.Tr. p. 38).

SPECIFICATION OF ERROR

1. Certain material findings of fact upon which the Board predicted its Order are erroneous because they are contrary to the evidence in the record considered as a whole and said findings are unlawful because they are not supported by substantial evidence upon the record considered as a whole.

2. There is no support either in fact or in law for conclusion of Board that trial examiner resolved conflicts in relevant testimony only upon evaluation of conflicting inferences and conclusions and without regard to demeanor of witnesses.

3. The conclusion of law by the Board that certain conduct was not in violation of the collective bargaining agreement is arbitrary and capricious and not in accordance with the law.

4. That the conclusion of the Board that their findings of fact supported a violation of Act 8(a) 3 and 1 of the Act is arbitrary, capricious and not in accordance with the law.

5. That the conclusions of fact made by the Board are erroneous as a matter of law in that they are not supported by substantial evidence on the whole record.

SUMMARY OF ARGUMENTS

I

To sustain a violation of Section 8(a) (1) or (3) substantial evidence must be present showing that the true purpose or real motive of the employer in taking the action complained of was to encourage or discourage Union membership or discourage the utilization of rights guaranteed under Section 7 of the Act and as there was not substantial evidence tending to show the above, the decision of the National Labor Relations Board finding such violation cannot be sustained.

II

The facts as erroneously found by the National Relations Board clearly show that Crowe was fired for a valid business reason and not otherwise and that therefore the decision of the Board should not be enforced.

III

The questions of credibility resolved by the trial examiner who observed the demeanor of the witnesses should not be reversed by the Board unless the testimony given credence to is hopelessly or inherently incredible and, therefore, the finding of the trial examiner that Crowe called Lowater and ordered him to come over to "C" site, must be sustained.

ARGUMENT

I

TO SUSTAIN A VIOLATION OF SECTION 8(a), (1) or (3) SUBSTANTIAL EVIDENCE MUST BE PRESENT SHOWING THAT THE TRUE PURPOSE OR REAL MOTIVE OF THE EMPLOYER IN TAKING THE ACTION COMPLAINED OF WAS TO ENCOURAGE OR DISCOURAGE UNION MEMBERSHIP OR DISCOURAGE THE UTILIZATION OF RIGHTS GUARANTEED UNDER SECTION 7 OF THE ACT AND AS THERE WAS NOT SUBSTANTIAL EVIDENCE TENDING TO SHOW THE ABOVE, THE DECISION OF THE NATIONAL LABOR RELATIONS BOARD FINDING SUCH VIOLATION CANNOT BE SUSTAINED.

The crux of a violation of Section 8(a), (1) or (3) is the true purpose or real motive of the employer in taking the action complained of. NLRB v. Jones & Laughlin Steel Corporation (1937), 301 U.S. 1, pages 45 through 46; Associated Press v. NLRB (1937), 301 U.S. 103; Radio Officers' Union, etc. v. NLRB (1954), 347 U.S. 17. Therefore, there must be substantial evidence supporting the theory that the employer's real motive was one prohibited by Section 8(a), (1) or (3) to sustain a violation of the Act.

Even taking the facts as found by the National Labor Relations Board as true, they clearly do not support a violation of either Section. The Board in its decision apparently took the position that its finding (despite a contrary finding by the trial examiner) that Crowe attempted to call Savage, his union steward, and after failing to locate him called Frank Lowater, a foreman, to have him tell Savage to come over to site "C", automatically established the required intent or motive necessary to sustain a

violation of either Section 8(a), (1) or (3).

While the record of the Board's decision does not contain a citation of any authorities to support the conclusions drawn, it would appear that they must have relied heavily upon the Radio Officers' Union case. Radio Officers' Union, etc. v. NLRB (1954), 347 U.S. 17, pages 42 through 44.

Prior to the Radio Officers' Union case, evidence of the surrounding circumstances was necessary in order to establish a violation of either Section 8(a), (1) or (3). If evidence of the surrounding circumstances supported the premise that the act was done with the requisite intent or motive and such evidence was substantial, in light of the whole record, then and only then could a violation be established. The Radio Officers' Union case established a different rule in a very limited number of cases. Two elements were necessary to invoke the rule: (1) the natural and foreseeable consequence of the employer's act or action must have been to encourage or discourage union membership or in some manner to discourage the exercise of the rights granted under Section 7 of the Act, and (2) the designation must solely (emphasis added) be based upon the criteria of union membership. If both elements are present, then the case alleging a violation of either 8(a), (1) or (3) of the Act is made and an employer's protestation that he did not intend to encourage or discourage union membership or rights granted under Section 7 of the Act must be regarded as irrelevant as a party must be determined to have intended the natural consequences of his action. Radio Officers' Union, etc. v NLRB (1954), 347 U.S. 17, at page

45. In the Radio Officers' Union case the criteria based solely upon union membership was that union and non-union workers were paid a different rate. The Court decided that such difference in pay would have a natural and foreseeable result to encourage or discourage union membership and that the criteria was based solely upon union membership and that, therefore, the alleged discrimination violation of the Act had been proved. The Board asked the Ninth Circuit to extend the rationale of the Radio Officers' Union case in the case of Pittsburgh Des Moines Steel Company v. NLRB (1960, 9th Circuit), 284 F. 2d 74. In that case the evidence was that the company had in accordance with a long established program, utilized five factors to determine the eligibility of particular company plants for Christmas bonuses. In the utilization of these factors it was apparent that a particular plant that had a protracted strike during the year would naturally be affected adversely by the criteria. The Board decided that since the utilization of these factors would adversely affect the strikers that the rule of the Radio Officers' Union case should be applied and that no further evidence of discrimination other than the bare act itself need be proved. The Court decided, however, that the rule of the Radio Officers' Union case applied only (emphasis added) where the factor used was union membership. The fact that the factor used would naturally apply more readily to unions or to union membership was held immaterial and accordingly refused to extend the doctrine of Radio Officers' Union. As there was little or no additional evidence brought forth to establish unlawful motive or intent to use these factors discriminatorily, the Court

decided there had been no violation of Section 8(a), (1) or (3).

In the instant case not even the Board suggested that Crowe was fired because of union membership. Rather all conceded that he was fired for taking some particular action. Counsel for the General Counsel contended, however, that the real motive behind the firing for this particular action, was because of anti-union bias on the part of Petitioner's management, but there was no evidence offered of anti-union bias unless the Radio Officers' Union case rule applies and Crowe's firing proves the bias.

As it is apparent that under the circumstances the action taken by Petitioner does not come within the doctrine of the Radio Officers' Union case, the violation is not proved unless there is circumstantial evidence in the record tending to establish that the motive or true intent of Petitioner's officers in firing Crowe was discrimination. It is significant in this respect to note that the Board in its findings of fact made no findings regarding either anti-union bias in general of Petitioner or anti-union bias against Crowe in particular because of any past protected activities. The only evidence alluded to at all pertaining in any way to this was the fact that about a month prior to the final termination of Crowe, Crowe and four others quit work because of what Crowe states (Rep. Tr. p. 5) was the firing of an electrical welder or what was stated by David G. Milne, Business Representative for the International Brotherhood of Electrical Workers (Rep. Tr. p. 56) to be a reclassification. After that the men who quit were rehired. It is submitted that this evidence is hardly substantial evidence from which to find

any improper motive on behalf of Petitioner in firing Crowe, and no such finding was made or could properly be made.

Since there was no substantial evidence showing that the true purpose or real motive of the employer was unlawful, no violation, therefore, was proven.

II

THE FACTS AS ERRONEOUSLY FOUND BY THE NATIONAL RELATIONS BOARD CLEARLY SHOW THAT CROWE WAS FIRED FOR A VALID BUSINESS REASON AND NOT OTHERWISE AND THAT THEREFORE THE DECISION OF THE BOARD SHOULD NOT BE ENFORCED.

The provisions of the Collective Bargaining Agreement between Petitioner and IBEW at the time in question are as follows:

ARTICLE I

Section 5. In the event of a dispute or where trouble arises on any job where workmen are employed under the terms of this Agreement, they shall remain on the job at work. All grievances or questions in dispute shall be adjusted by the duly authorized representatives of both parties to this Agreement . . . .

ARTICLE III

Section 10. No Foreman of one job shall at the same time perform work or supervise work on another job. . . .

Section 11. On jobs having a Foreman, workmen are not to take directions or orders or accept the layout of any job from anyone except the Foreman. This does not deny the Employer or his representative the right to give directions, orders, or layout through the proper channels.

Crowe testified that he was familiar with the above rules (Rep.Tr. pp. 23 and 24) and giving his testimony full effect, as did the Board, but not the Trial Examiner, it was that he first attempted to locate Savage, the union steward, and failing this called Lowater, a foreman, and told him to tell Savage to come over to site "C". It is apparent from the reading of the indicated Articles and Sections that workmen are not to give orders to foremen and the Board itself seems to indicate that if Crowe told Lowater to come over to site "C", this would be a valid business reason for the discharge and the firing would have accordingly been proper. This is in accordance with Board decisions holding that a person was properly discharged when leaving his production line to present grievances without notifying a foreman or fellow workers when required by plant rules to do so. D. W. Terry dba Terry Poultry Company (1954), 109 NLRB 1097. It is difficult to understand why a clear order to a foreman directing the foreman to notify the shop steward that "someone over there was doing our work" would not be violative of company discipline, if an order to the foreman to come to "C" site would be such a violation. The fact that the discipline was also

a matter covered by the Collective Bargaining Agreement merely adds additional weight to the conclusion that the discharge was for a proper business reason. In any event, the evidence is not disputed that Norm Coghlin, vice president and field superintendent of Amco at Vandenberg, was unquestionably irritated at Crowe because of his radio conversation with Lowater. Depending on the version of Crowe's conversation which is believed, Coghlin was irritated at Crowe either because Crowe had ordered Lowater, a foreman, to come over to site "C", or because Crowe had ordered Lowater, a foreman, to locate Savage and tell Savage to come over to site "C". It is respectfully submitted that whichever version of what Crowe said is believed, an order to a supervisory employee was made and the evidence is clear and settled that it was this order which caused Crowe to be fired.

III

THE QUESTIONS OF CREDIBILITY RESOLVED BY THE TRIAL EXAMINER WHO OBSERVED THE DEMEANOR OF THE WITNESSES SHOULD NOT BE REVERSED BY THE BOARD UNLESS THE TESTIMONY GIVEN CREDENCE TO IS HOPELESSLY OR INHERENTLY INCREDIBLE AND, THEREFORE, THE FINDING OF THE TRIAL EXAMINER THAT CROWE CALLED LOWATER AND ORDERED HIM TO COME OVER TO "C" SITE MUST BE SUSTAINED.

Questions of credibility are for the trial examiner who has the opportunity to observe the demeanor of the witnesses NLRB v. West Coast Casket Co., Inc. (1953, 9th Circuit),

205 F. 2d 902, 906; Universal Camera Corp. v. NLRB (1951), 340 U.S. 474, page 488; NLRB v. San Diego Gas and Electric Co. (1953, 9th Circuit), 205 F. 2d 471, at page 475; NLRB v. Swinerton (1953, 9th Circuit), 202 F. 2d 511, 514, cert. den. 344 U.S. 814.

The trial examiner's valuation of oral evidence will not be disturbed unless the testimony which he credits is hopelessly or inherently incredible.

NLRB v. Steel, Metals and Hardware Fabricators etc. Local, Local 810 (1960, 2nd Circuit), 274 F. 2d 688; NLRB v. Davisson (1955, 9th Circuit), 221 F. 2d 802; NLRB v. Dominion Oil Co. (1952, 2nd Circuit), 201 F. 2d 484, 490. As was stated by the 9th Circuit in Pittsburgh DesMoines Steel Co. v. NLRB (1960, 9th Circuit), 284 F. 2d 274, "We are not reluctant to insist that an examiner's finding on veracity must not be overruled without a very substantial preponderance in the testimony as recorded, NLRB v. Universal Camera (1951, 2nd Circuit), nor should the Board be permitted either to draw unwarranted inferences to reverse a finding of credibility made by the trial examiner or to discard positive findings of credence of favor of inference drawn from tenuous circumstances".

NLRB v. Pyne Molding Co. (1955, 2nd Circuit), 226 F. 2d 818, 819; Boeing Airplane Co. v. NLRB (1954, 9th Circuit), 217 F. 2d 369, 376. In the instant case the trial examiner made a specific finding that his findings of fact were based "upon consideration of the entire record, the demeanor of the witnesses, and briefs filed by general counsel and respondent". Here there was a head-on

conflict in testimony between that given by Crowe and between the testimony of the other witnesses. Crow testified that he first attempted to call Savage, his job steward. That it was only when he was unable to contact Savage that he called Lowater. The Trial Examiner found: "Crowe's claim that he attempted to contact Savage first is viewed as being not worthy of credence." The testimony of Lowater reflects that Crowe in fact did instruct or request him to come immediately to "C" site. The record is devoid of any evidence that Savage went to "C" site and this fact lends support to the proposition that Crowe was interested only in having Lowater, rather than Savage, come there, and his testimony that he was interested primarily in having Savage notified of the ironworkers' actions is immaterial, if it in fact occurred. Crowe did not work under the supervision of Lowater, but under the supervision of Foreman Raymond Cassidy. He was successful in making contact with Frank Lowater, on the radio telephone, who was approximately 18 miles away at another site. Lowater was the man whose crew did the categories or work Crowe wanted done.

Further, not one of the witnesses who had their radio sets on, recalled hearing Crowe in his alleged attempt to get in touch with Savage. Lowater's testimony (a witness of the general counsel and not of the petitioner) was, on direct, that Crowe asked him to contact Savage and that then he, Lowater, said "10-4, I will be right over" (Emphasis added). When Lowater was cross-examined on this, he was asked whether in light of the response he had given it was possible that Crowe, in addition to asking him to relay a

message to Savage, had also requested that he come over to "C" site. Lowater's response to this was he couldn't remember whether or not Crowe had asked him to come over, but that in light of his response which he knew he gave, he could have said that. Further, on redirect (Rep. Tr. p. 95), Lowater testified what his best recollection of Crowe's statement was, "Well, I don't recall the exact words that he used, but it was more for me to go get hold of Doc Savage and to come over to Charley's site" (Emphasis added).

Thus, Crowe, a person whose testimony the Trial Examiner, after observing him, stated was not worthy of credence, was the only one who testified that he called for Savage first and only then contacted Lowater and that he merely asked Lowater to relay a message. Lowater's testimony is consistent with the testimony given by the rest of the witnesses while it is to varying extents inconsistent with the testimony given by Crowe. It is submitted, therefore, that the decision of the National Labor Relations Board that Crowe merely attempted to get in touch with Savage, the Union steward, is not supported by substantial evidence and hence cannot be sustained.

CONCLUSION

It is respectfully submitted that on the basis of the findings of credibility by the trial examiner and on the basis of substantial evidence in the record it must be concluded: (1) that there is no substantial evidence showing that Crowe was discharged in violation

of either Section 8(a), (1) or (3); and (2) the evidence, even as erroneously found by the Board, and especially as found by the trial examiner, clearly establishes that Crowe was discharged for a lawful cause. Therefore, the intermediate and recommended order of the trial examiner should be affirmed and the decision and order of the National Labor Relations Board should be reversed.

Respectfully submitted,
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Attorneys for Petitioner.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ C. E. Millikan, Jr.
C. E. MILLIKAN, JR.